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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. _____.

WINFRED WISNIESKI,

Petitioner,

v.

STATE OF OHIO on the Relation of ADAM KENDZIA,

and

JOHN J. CARNEY, DAN W. DUFFY, ROBERT E. HUGHES, S. G. STILLMAN, Forming and constituting the body known as The Cuyahoga County Board of Elections,

Respondents.

PETITION FOR A WRIT OF CERTIORARI To the Ohio Supreme Court.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered on October 29, 1969 allowing a Writ of Prohibition restraining the Cuyahoga County Board of Elections from printing and placing the name of petitioner on the official ballot as a candidate for Mayor of Independence, Ohio in a municipal election.

CITATIONS TO OPINIONS BELOW.

The opinon and judgment of the Supreme Court of Ohio which granted the Writ of Prohibition, printed in Appendix A, *infra*, p. 19, along with the dissenting opinion, p. 20, is reported in 20 Ohio St. 37 (1969).

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JURISDICTION.

The judgment of the Ohio Supreme Court was entered in the subject cause on October 29, 1969. The jurisdiction of this Court is involved under 28 U.S.C. § 1257 (3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

I.

Whether petitioner's permanent disqualification from holding any further office in the municipal corporation of Independence, Ohio as a result of a judicial proceeding in which petitioner, though made a party-respondent to that proceeding, had no opportunity to present evidence or to be heard prior to the court's judgment in that proceeding, violated the Due Process Clause of the Fourteenth Amendment.

II.

Whether petitioner's permanent disqualification, pursuant to an Ohio statute, from holding any further office in the municipal corporation of Independence, Ohio by reason of previously having an interest in the expenditure of money on the part of that municipal corporation while an officer thereof, following petitioner's plea of guilty, under a separate statute, to a misdemeanor for having had an interest in a contract with such municipal corporation, at the same time that no permanent disqualification from holding further office was imposed upon convicted felons by the State of Ohio, violated the Equal Protection Clause of the Fourteenth Amendment.

III.

Whether petitioner's permanent disqualification, pursuant to an Ohio statute, from holding any further office in the municipal corporation of Independence, Ohio by reason of previously having an interest in the expenditure of money on the part of that municipal corporation while an officer thereof, following petitioner's plea of guilty, under a separate statute, to a misdemeanor for having had an interest in a contract with such municipal corporation, at the same time that no permanent disqualification from holding further office was imposed upon convicted felons by the State of Ohio, violated the Due Process Clause of the Fourteenth Amendment.

IV.

Whether petitioner's permanent disqualification, pursuant to an Ohio statute, from holding any further office in the municipal corporation of Independence, Ohio by reason of previously having an interest in the expenditure of money on the part of that municipal corporation while an officer thereof, following petitioner's plea of guilty, under a separate statute, to a misdemeanor for having had an interest in a contract with such municipal corporation, at the same time that no permanent disqualification from holding further office was imposed upon convicted felons by the State of Ohio, constituted an imposition of cruel and unusual punishment in violation of the Eighth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions involved are the Eighth and Fourteenth Amendments to the Constitution of the United States.

The statutory provisions involved are Ohio Revised Code Sections 1.05, 1.06, 733.78, 2919.08, 2919.10, 2919.13, 2951.09, 2961.01, 2965.17, and 3599.02.

The foregoing constitutional and statutory provisions are printed in Appendix B, pp. 25-29.

STATEMENT OF FACTS.

On October 29, 1969, the Supreme Court of Ohio allowed a Writ of Prohibition filed by Adam Kendzia, an elector of the City of Independence, Ohio against the Cuyahoga County Board of Elections by which the Board of Elections was restrained from placing the name of petitioner, a prior Mayor of Independence, on the official ballot as candidate for mayor of that city in the municipal election to be held on November 4, 1969.[1]

The Court held that since petitioner had earlier pled guilty to offenses specified in Ohio Revised Code Section 2919.10, he had thereby admitted to violations of another Statute, Ohio Revised Code Section 733.78, in that while an officer of Independence, Ohio he had an interest in the expenditure of money on the part of that municipal corporation, and by the admission of such violations he was, pursuant to Section 733.78 "disqualified from holding any office or trust for profit" in the City of Independence. The Court's ruling not only disqualified him in the election of November 4, 1969 but disqualifies him from holding any office there for all the time in the future.[2]

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[1] Per Curiam Opinion, Appendix A, pp. 19-20.

[2] Per Curiam Opinion, Appendix A, p. 20.

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Petitioner was indicted in April of 1967 under Ohio Revised Code § 2919.08 for having an interest in contracts for the purchase of automobile parts for use of vehicles of the City of Independence while holding the office of mayor of that municipal corporation some years earlier.[3] On March 18, 1968, petitioners entered a plea of guilty to a violation of Ohio Revised Code § 2919.10,[4] a lesser included offense, which, by statutory definition, is a misdemeanor.[5] Imposition of sentence was suspended and petitioner was placed on probation on June 11, 1968 for two years by the Cuyahoga County Court of Common Pleas.[6] That two-year probation was terminated after eleven months on June 2, 1969.[7]

For reasons stated below, even though petitioner was made a party to these proceedings (on the date of decision therein),[8] he had no opportunity to submit evidence on his behalf so that the record is absent of details which are essential to a full understanding of this cause. Accordingly, we have respectfully appended petitioner's Affidavit within the Appendix to proffer that which he would have submitted on his behalf had he received a hearing.

Petitioner, a resident of Independence for all of his 61 years, held office as mayor of the City of Independence, Ohio for the period of ten years from 1955 to 1965, having been elected by the voters of Independence to five con-

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[3] Stipulation of Fact, 7 (a) (b) (c) (d) in Record.

[4] Joint Answer in Record; Section 2919.10 appears in Appendix B, pp. 26-27.

[5] Ohio Revised Code § 1.06 defines a felony as an offense punished by imprisonment in the penitentiary. Ohio Revised Code § 1.05 provides for imprisonment in the penitentiary if the maximum term prescribed for the offense is longer than one year.

[6] Petitioner's Affidavit, Appendix C, p. 31.

[7] Petitioner's Affidavit, Appendix C, p. 31.

[8] Journal Entry in Prohibition, Record.

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secutive two-year terms. He was seeking re-election to that office last November. He has never run for office except in the municipality of Independence, and he desires the opportunity to run for municipal office in Independence in the future.[9]

The offenses involved in the indictment under Section 2919.08 and plea of guilty to Section 2919.10 concern the repair of police and service vehicles owned and operated by the City of Independence at Independence Ford Garage, Inc., a corporation in which petitioner was an officer and a shareholder. Independence Ford, in existence 55 years, has furnished automobile parts for municipally owned vehicles in the municipality of Independence for over half a century. Since Independence Ford was the only Ford dealer in the municipality of Independence, convenience dictated that all Ford vehicles be serviced there rather than at more distant garages in other parts of the county. Charges for parts and labor for these municipal vehicles at Independence Ford was reasonable. During the years that such work was being performed at Independence Ford, while petitioner was Mayor of Independence, it was done openly with the assent of city officials.[10]

Petitioner again qualified as a candidate for the office of mayor of Independence in the 1967 election, and his name was again scheduled to appear on the election ballot of November 4, 1969 when Relator filed a protest on September 8, 1969 with the Cuyahoga County Board of Elections against the candidacy of petitioner.[11]

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[9] Petitioner's Affidavit, Appendix C, pp. 30-31.

[10] Petitioner's Affidavit, Appendix C, pp. 30-31.

[11] Petition in Prohibition, paragraph 2 on page 1.

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On September 29, 1969, a hearing was held before the Board of Elections at which time the Board unanimously disallowed the protest of Relator.[12]

Two days later, on October 1, 1969, Relator filed a Petition in Prohibition in the Supreme Court of Ohio, naming as sole respondents the four members of the Cuyahoga County Board of Elections.[13] The Joint Answer was filed on behalf of all four members of the Board of Elections on October 6, 1969 by John T. Corrigan, Prosecuting Attorney of Cuyahoga County.[14] Relator filed his brief on October 6, 1969.[15] On the same date, counsel for Relator and the Board of Elections filed joint Stipulations of Fact.[16]

No brief was ever filed by counsel for the Board of Elections in answer to that of Relator. Rather, on October 9, 1969 a letter on behalf of the Board of Elections was filed with the Ohio Supreme Court waiving the filing of a brief and oral argument.[17] Petitioner, through his counsel, filed a Motion for Leave to be Made a Party-Respondent on October 9, 1969.[18] Relator filed a brief in opposition to that motion on October 13, 1969.[19] Petitioner's Motion to be Made a Party-Respondent was allowed on October 29, 1969 by the Ohio Supreme Court, the same

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[12] Minutes of Board of Elections Hearing, p. 17, Record.

[13] Petition in Prohibition, Record.

[14] Joint Answer, Record.

[15] Brief of Relator, Record.

[16] Stipulations of Fact, Record.

[17] Letter from Board of Elections on October 9, 1969, Record.

[18] Motion for Leave to be Made a Party Respondent, Record.

[19] Brief of Relator in Opposition to Motion for Leave to be Made a Party Respondent, Record.

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date that the court allowed Relator's Petition in Prohibition.[20]

Petitioner thus became a party to the lawsuit on the very day that the Ohio Supreme Court in its four to three decision[21] barred petitioner from seeking further office in the city in which he has been a life-long resident and a prior office holder for ten years.

Accordingly, petitioner became a party to the Prohibition action in which he had no opportunity to present evidence, no opportunity to file a brief or no opportunity to plead his cause orally.

REASONS FOR GRANTING THE WRIT.

I. Petitioner was denied procedural due process by the failure to accord him a hearing in the court below.

The Court has held on repeated occasions that the Due Process Clause of the Fourteenth Amendment requires that the taking of life, liberty or property by judicial process be preceded by notice to the affected party and an opportunity for a hearing appropriate to the nature of the case. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1949). While due process has not rigorously defined the content of such hearing, opportunity must be afforded the party, in oral argument or in writing, to defend his liberty or his property before it is taken away from him. *Federal Communications Commission v. WGR, The Good Will Station, Inc.*, 337 U.S. 265 (1948). The opportunity to be heard before the rendering of judgment is an essential element of due process. *L. B. Wilson, Inc. v. Federal Communications Commission*, D.C. Cir., 170 F.2d 793 (1948).

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[20] Journal Entry, In Prohibition, Record.

[21] Appendix A, p. 20.

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It was imperative that petitioner become a party to the Petition in Prohibition as he, rather than the Relator or the Cuyahoga County Board of Elections was most dramatically affected by the result of the suit. Yet, the granting of Petitioner's Motion for Leave to be Made a Party Respondent[22] on the same date that the Ohio Supreme Court rendered its judgment and opinion served to bind him to that judgment by reason of res judicata without ever having had an opportunity to defend his position. His opportunity to run for public office at that time or in the future in the municipality in which he has resided for sixty-one years was taken away by a judicial proceeding in which he was unable to support his cause either by oral argument or by a written brief.

The opportunity for petitioner to speak on his own behalf was important where the originally named Respondents, the Board of Elections, had no vital interest at stake which would otherwise have motivated their waging a strong defense in support of petitioner. But petitioner's opportunity to be heard became vitally necessary when the Board of Elections was defended by a member of the staff of the Cuyahoga County Prosecutor who did the following:

(a) He filed a Joint Answer in which he admitted four of the five paragraphs of the Petition in Prohibition. Among the admissions was included an averment by Relator that the action by the Respondent Board of Elections (in disallowing the protest at the hearing of September 29, 1969) was "arbitrary, illegal, and a gross abuse of discretion." [23]

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[22] Journal Entry, In Prohibition, Record.

[23] Joint Answer, Record, Petition in Prohibition, page 2, paragraph 4, Record.

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(b) He wrote a letter to the Ohio Supreme Court dated October 9, 1969 in which he waived the filing of a Brief in Response to that of Relator and waived oral argument.[24]

Apart from agreeing to the Joint Stipulations of Fact, this was the entire defense offered by the County Prosecutor in support of the unanimous decision of the Cuyahoga County Board of Elections on September 29, 1969 when the Board disallowed the protest of Relator.[25]

The quality of defense rendered by counsel for the Board makes one wonder whether counsel was not avowing rather than opposing the Petition in Prohibition.

Because of the type of defense offered by the counsel for the Board of Elections, it was essential that petitioner be given an opportunity to be heard in defense of his right to candidacy for office in his community in that election and in the future. The failure to permit petitioner this hearing has required the filing of petitioner's affidavit to furnish evidence he would have offered at such hearing.

The failure to accord petitioner a hearing has deprived him of his opportunity to run for and hold public office in his home community without due process of law. As this Court noted almost a century ago in *Windsor v. McVeigh*, 93 U.S. 274 (1876) on page 277:

> "Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or

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[24] Letter from Respondent Board of Elections dated October 9, 1969, Record.

[25] Minutes of Board of Elections Hearing, p. 17, Record.

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giving him an opportunity to be heard, is not a judicial determination of his right and is not entitled to respect in any other tribunal."

Review of this case would permit the Court to affirm that the traditional standards of procedural due process apply to one who becomes party to a suit after commencement thereof in the same manner as those standards apply to the original litigants, particularly where such new party is the prime stakeholder in such litigation.

II. Petitioner's permanent disqualification from holding further office in Independence, Ohio, is a violation of the Equal Protection of the Laws of the Fourteenth Amendment.

Though a person has no absolute right to run for public office, he cannot be barred by state-imposed standards forbidden by the Constitution. *Torasco v. Watkins*, 361 U.S. 488 (1959).

It is conceded that running for public office, as with voting, may be subject to the imposition of state standards which are non-discriminatory and which possess some basis in reason. *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1958).

The state properly has an interest, at least during the period of imposition of punishment, in preventing those persons convicted of serious crimes from voting and holding public office. The Ohio statute which disfranchises convicted felons[26] creates a permissible classification of

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[26] § 2961.01 Disfranchisement of convict, Appendix B, p. 28:

"A person convicted of a felony in this state, unless his conviction is reversed or annulled, is incompetent to be an elector or juror, or to hold an office of honor, trust, or profit. The pardon of a convict restores the rights and privileges so forfeited, * * *."

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persons excluded from holding office. It deprives the felonious offender of all civil rights and privileges, as voter, juror or officeholder, but makes available restoration of these rights and privileges by pardon, completion of sentence or parole.[27] And Ohio Revised Code Section 2951.09 provides that a felon on probation may be restored to his rights of citizenship by a judge of the court of common pleas.[28]

Examination of the Ohio Revised Code reveals only two sections, involving conviction for a misdemeanor, which place any limitation on the holding of office in the future. In each instance the disqualification is for a term of years,[29] and not for life as with Ohio Revised Code 733.78.

Ohio Revised Code § 733.78 creates a specific classification of offender, to-wit: an official of a municipal corporation, who commits a specific offense, to-wit: having an interest other than fixed compensation, in the expenditure of money by the municipal corporation. That section imposes on the violator permanent disqualification from holding any office of trust or profit in the municipal corporation so involved.

The dissenting opinion in the Ohio Supreme Court observes "this section (733.78) represents the only statutory provision, so far as we are able to discover, whereby

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[27] Ohio Revised Code § 2965.17, Appendix B, pp. 28-29:

"* * * a prisoner who has served the maximum term of his sentence or who has been granted his final release by the commission (after parole) shall be restored to the rights and privileges forfeited by his conviction."

[28] Appendix B, pp. 27-28.

[29] Ohio Revised Code § 2919.13, Extortion by a Public Officer, provides that a person convicted thereunder shall be disqualified from holding public office for seven years. Ohio Revised Code § 3599.02, Sale of Vote by Voter, disqualifies the violator from holding public office for five years.

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anyone in the state may be perpetually barred from holding a public office." [30] No opportunity is given this violator of Section 733.78, in contrast to a felonious offender, to qualify for office after pardon, completion of sentence, parole, or upon termination of probation by restoration of his rights of citizenship by a judge of the Court of Common Pleas.[31]

And no distinction is made in Section 733.78 between a violator who commits a misdemeanor rather than a felony.

There is no rational explanation for the creation of the classification by the State of Ohio under Section 733.78 which classification bans for life a municipal officer from holding further office in that municipality if he violates a specific offense, that of having an interest in the expenditure of money by that same municipality, whether such offense be a misdemeanor or a felony, when under the statutes of Ohio which impose general disfranchisement of persons convicted of a felony no lifetime ban on holding office is imposed.

Therefore, the State of Ohio has, by reason of Section 733.78, created a classification in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Court, while not deciding this precise issue, has applied the Equal Protection Clause to invalidate state laws which created discriminatory classification in the elective process. State legislative malapportionment, *Baker v. Carr*, 369 U.S. 186 (1961); state election laws discriminatory in favor of established political parties, *William v. Rhodes*, 393 U.S. 23 (1968); a state law which permits only property holders to vote in elections called

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[30] Appendix A, p. 22.

[31] See footnotes 26, 27, 28 *supra*.

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to approve issuance of revenue bonds by a municipal utility. *Cipriano v. City of Houma*, 89 S. Ct. 1897 (1969); a state law which prohibited a serviceman from establishing domicile in order to vote as an elector, *Carrington v. Rash*, 380 U.S. 89 (1964); a state law which conditioned the right to vote on the payment of a poll tax, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1965).

And a state is not permitted to exclude one from the practice of law or from any other occupation in a manner or for reasons that contravene the Equal Protection Clause of the Fourteenth Amendment. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

This case presents the issue of denial of the Equal Protection Clause of the Fourteenth Amendment by reason of petitioner's classification in a category created by Section 733.78 which is invidiously discriminatory against him.

In view of the extension of the Equal Protection Clause to election procedures during the past decade thereby correcting unequal discriminatory treatment by states among communities, political parties, and classes of voters, opportunity is afforded the Court to correct similarly unequal treatment meted out by states to aspirants for public office.

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III. Petitioner's permanent disqualification from holding further office in Independence, Ohio is a violation of the Due Process Clause of the Fourteenth Amendment.

In addition to creating a discriminatory classification contrary to the Equal Protection Clause, Section 733.78 is in violation of the Due Process Clause of the Fourteenth Amendment as it arbitrarily and discriminatorily excludes petitioner from holding further municipal office in Independence.

The Court has regularly held that a state may not impose unconstitutional conditions upon public employment, even though such public employment could have been denied altogether. *Keyishian v. Board of Regents,* 385 U.S. 589 (1966).

A state violates the Due Process Clause of the Fourteenth Amendment when it summarily dismisses a teacher invoking the Fifth Amendment without according him the hearing his tenure entitled him. *Slochower v. Board of Education,* 350 U.S. 551 (1955). A person may not be excluded by a state from the practice of law or other profession by procedures which do not accord him due process. *Schware v. Board of Bar Examiners, supra.* And a state loyalty oath which excluded persons from employment solely on the basis of organizational membership was held to offend due process in *Wieman v. Updegraff,* 344 U.S. 183 (1952), the Court saying on page 192:

> "It is significant to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary."

Where the State of Ohio has permanently disqualified petitioner from holding municipal office in Independence by reason of a particular statute which imposes such ban

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following commission of a misdemeanor, at the same time that the state otherwise deprives one of his opportunity to hold office only after conviction for a felony, yet permitting such felon to regain such opportunity to hold office by pardon or restoration of rights of citizenship upon termination of sentence, parole, or probation, such disqualification possesses the same arbitrariness and want of due process.

As pointed out in the prior section of the brief, the Court has extended Fourteenth Amendment protection to the election process to prohibit unequal discriminatory treatment by states to localities, to minor political parties, and to certain classes of voters. An opportunity is here presented to the Court to show that similarly the Constitution does not permit states to impose arbitrary and unreasonable standards upon those who would seek political office.

IV. Petitioner's permanent disqualification from holding further office in Independence, Ohio constitutes cruel and unusual punishment.

It is recognized that the Court has usually interpreted cruel and unusual punishment to apply to punishment that involves extreme physical neglect or abuse which is of such character as to shock the general conscience or to be intolerable to fundamental fairness. However, the Court, on occasion has described punishment as cruel and unusual if it is greatly disproportionate to the offense for which it is imposed. *Weems v. United States,* 217 U.S. 349 (1910). And it has characterized certain forms of punishment as cruel and unusual when, although applied in pursuit of a legitimate aim, it goes beyond what is necessary in order to achieve that aim. *Weems v. United States, supra; Robinson v. California,* 370 U.S. 660 (1962), 677 (concurring opinion of Douglas, J.). Cruel and un-

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usual punishment has been interpreted "in the light of developing concepts of elemental decency." *Weems v. United States, supra,* p. 378.

This developing concept of elemental decency was demonstrated in *Trop v. Dulles,* 356 U.S. 86 (1958), when the Court determined that the denationalization of a deserter in time of war was unconstitutional as cruel and unusual punishment. Thus, the Eighth Amendment was invoked though the punishment involved neither physical mistreatment nor torture.

Although permanent bar from holding public office in a municipality is obviously less severe punishment than is denationalization, one wonders whether, in the context of the respective offenses, petitioner may not have been subjected to a more disproportionately cruel punishment than Trop.

And in a state where the statutory scheme permits the restoration of civil rights, including the right to hold public office, to convicted felons by action of a common pleas judge at the termination of probation, by the action of the pardon and parole commission at the termination of parole or at the conclusion of the maximum term of sentence, or by executive clemency, the imposition of a permanent prohibition against further holding public office in the municipality in which petitioner has been a life-long resident following his plea to a misdemeanor, appears cruel and unusually harsh by comparison.

Review of petitioner's writ would provide opportunity for the Court to recognize that in the light of developing standards of elemental decency, the loss of part of a fundamental right of citizenship in the guise of a permanent proscription from holding further office in the municipality which has been one's lifetime residence, following violation of a lesser crime, is punishment excessively cruel and unusual.

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CONCLUSION.

The Court is here afforded an opportunity to review a case which can define the limits of state control in election matters in an area not yet examined by the Court, that of qualifications of candidates for office.

The Court is able to articulate the procedural due process required before a candidate may be permanently disqualified from office in a judicial proceeding, and as well can decide whether permanent disqualification from further municipal office following a plea of guilty to a lesser offense is unconstitutionally arbitrary and discriminatory in violation of the Fourteenth Amendment or the imposition of Cruel and Unusual Punishment under the Eighth Amendment.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Cleveland, Ohio 44114,
Counsel for Petitioner.

JULIEN C. RENSWICK,
CHARLES A. ABOOKIRE, JR.,
Of Counsel.

APPENDIX A.

OPINION OF THE SUPREME COURT OF OHIO.

THE STATE, EX REL. KENDZIA, v. CARNEY ET AL., BOARD OF ELECTIONS OF CUYAHOGA COUNTY.

[Cite as State, ex rel. Kendzia, v. Carney, 20 Ohio St.2d 37.]

(No. 69-654—Decided October 29, 1969).

IN PROHIBITION.

Mr. Charles E. Merchant, for relator.

Mr. John P. Corrigan, prosecuting attorney, and Mr. John L. Dowling, for respondents.

PER CURIAM. Wisnieski was indicted for numerous felonies under Section 2919.08, Revised Code, for unlawfully having an interest in contracts for the purchase of automobile parts for use of the vehicles of the city of Independence while he was holding the office of mayor of that municipal corporation.

He pleaded guilty to the lesser included offenses specified in Section 2919.10, Revised Code, of being interested in the profits of those contracts, thereby admitting that, while mayor of Independence, he was interested in such contracts for purchase of property for that city.

He thus admitted to violations of Section 733.78, Revised Code, i.e., that he did "have" an "interest" while an "officer of" Independence "other than his fixed compensation, in the expenditure of money on the part of" that "municipal corporation."

That section states that any person who violates the section "shall be disqualified from holding any office of trust or profit in the municipal corporation."

If Wisnieski is disqualified from being mayor of Independence, a writ of prohibition should be issued pro-

hibiting the board of elections from placing his name on the official ballot of a candidate for mayor of Independence. *State, ex rel. Flynn, v. Board of Elections* (1955), 164 Ohio St. 193, 129 N.E. 2d 623; *State, ex rel. Newell, v. Brown* (1954), 162 Ohio St. 147, 122 N.E. 2d 105; *State, ex rel. Higgins, v. Brown* (1960), 170 Ohio St. 511, 166 N.E. 2d 759.

This Court held in *Holbrock v. Smedley* (1909), 79 Ohio St. 391, 87 N.E. 269, that an admission of facts which would constitute a violation of Section 1536-205, Revised Statutes (Section 733.78, Revised Code), was sufficient to establish the disqualification provided for by that section as a penalty for its violation.

Writ allowed.

TAFT, C.J., MATTHIAS, O'NEIL and CORRIGAN, JJ., concur. SCHNEIDER, HERBERT and DUNCAN, JJ., dissent.

SCHNEIDER, J., dissenting. We should be controlled by the historic principle that elections are primarily matters for political regulation, and only secondarily are they the subject of judicial cognizance. Therefore, the decision of the board of elections on a matter properly within the scope of its authority should be final, in the absence of fraud, corruption, a flagrant misinterpretation of statutes or a clear disregard of legal provisions. *State, ex rel. Flynn, v. Board of Elections*, 164 Ohio St. 193, and *Sullivan v. State, ex rel. O'Connor*, 125 Ohio St. 387. No fraud or corruption being alleged, our consideration should be limited to whether the board flagrantly misinterpreted or clearly disregarded the statutes.

An analysis of Sections 2919.10 and 733.78, as well as Sections 733.72 to 733.77, inclusive, Revised Code, prevents me from concluding that the board's position con-

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stituted either a "flagrant misinterpretation" or a "clear disregard" of the statutory sanctions for what may be characterized, for the purpose of discussion, the offense of "conflict of interest" of a municipal officer.

The antecedent of Section 2919.10, Revised Code, the oldest of the statutes under consideration and clearly criminal in nature and effect, was first adopted in substantially its present form on May 7, 1869 (66 Ohio Laws 163, 164, Section 92), as a part of a comprehensive act to provide for the organization of cities and villages. (The statute originally contained no reference to township officers.) In 1871, the General Assembly enacted what are now Sections 733.72 to 733.77, inclusive, Revised Code (68 Ohio Laws 113), which furnish a procedure, obviously civil in nature and effect, to remove a municipal officer for a conflict of interest. Under such procedure, the defendant may be tried by the probate judge upon complaint of five electors of the municipal corporation (Section 733.72); may have counsel and demand a jury (Section 733.73); may challenge jurors, peremptorily and for good cause (Section 733.74); may have process to compel the attendance of witnesses (Section 733.75); and, if "the charges * * * are sustained by the verdict of the jury, or by the decision of the probate judge, when there is no jury," may be removed from office. No other sanction was, or is now, provided.

At this stage, it may be observed that the criminal sanctions contained in what is now Section 2919.10, Revised Code, were merely complemented by the civil sanctions of what are now Sections 733.72 to 733.77, inclusive, Revised Code. (The Act of May 1, 1871 [68 Ohio Laws 113], did not define conflict of interest as such, but merely set forth, as a cause for removal proceedings, a violation of the Act of May 7, 1869 [66 Ohio Laws 1163].) In other

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words, if the criminal process was ineffectual in a conflict of interest matter, the civil process was made available. The only difference was, and still is, that if the former were pursued to its successful conclusion, the culprit was subject to fine or confinement, or both, in addition to removal from office.

Not until 1902 (96 Ohio Laws 20, 37, Section 45), did the General Assembly see fit to adopt the antecedent of Section 733.78, Revised Code, in substantially its present form. That represents the only statutory provision, so far as we are able to discover whereby anyone in the state may be perpetually barred from holding a public office. And, paradoxically, it is confined to an errant municipal officer with respect to an office only in the government of the particular municipal corporation which was his victim. But the critical feature of the decision of the General Assembly to enact this statute at that time and in the particular form adopted, is that the sanction of permanent disbarment from office was attached, not to the criminal statute (Section 2919.10, Revised Code), nor to the civil removal statutes (Sections 733.72 to 733.77, inclusive, Revised Code), but to a new, express provision for civil liability (to the municipal corporation for all sums of money or other things received of the miscreant). Therein lies the chief weakness of the majority opinion.

Mindful of the rule that criminal statutes are to be strictly construed in favor of the accused, and of the characterization by the late Judge Stewart that statutes authorizing the removal of an incumbent from office (Sections 733.72 to 733.78, inclusive, Revised Code) are "quasipenal" in nature (*In re Coppola*, 155 Ohio St. 329), I would hold that when Wisnieski pleaded guilty to a violation of Section 2919.10, Revised Code, he accepted the sanction of removal from office if in office at the time. But,

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he did not plead guilty to a violation of Section 733.78, Revised Code, nor to any of its sanctions, one of which (permanent disqualification from office), although severe and quasipenal, is nonetheless civil. Nor were removal proceedings instituted against him under Section 733.72 *et seq.*, Revised Code.

Concededly, the proposition that a criminal conviction arising from a plea of guilty is conclusive for all purposes and for all time, i.e., *res judicata* of the facts necessarily encompassed therein, has a reasonable appeal. Although in this state we have historically followed the practice of admitting the fact of a prior guilty plea in a criminal case into evidence in a civil proceedings predicated upon the same acts which supported the conviction, we have never held, nor has it ever been claimed, that the conviction is *res judicata* as to the act in controversy in the civil proceeding. See *Clinger v. Duncan*, 166 Ohio St. 216; *Freas v. Sullivan*, 130 Ohio St. 486; *Clark v. Irvin*, 9 Ohio 131. Unquestionably, one reason for this is that in many cases a plea of guilty may, in fact, amount to a compromise by the defendant to avoid an expensive or undesirable trial, or both. Experience has shown that such compromises can also benefit society.

The board of elections was not clearly in error. Therefore, its decision should not be disturbed.

Herbert and Duncan, JJ., concur in the foregoing dissenting opinion.

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ORDER OF THE SUPREME COURT OF OHIO.

(Entered October 29, 1969.)

This cause originated in this Court upon the filing of a petition for a writ of prohibition seeking an order from this Court restraining respondents from printing and placing the name of Winfred Wisnieski on the official ballot as a candidate for Mayor of the City of Independence, Ohio, in the municipal election to be held on November 4, 1969. Briefs were filed and this cause was heard in the manner prescribed by law. On consideration thereof, the writ of prohibition is hereby allowed for the reasons set forth in the opinion rendered herein.

It is further ordered that relator recover from respondents costs herein expended.

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APPENDIX B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States.

Amendment VIII:

* * * nor cruel and unusual punishments inflicted.

Amendment XIV, Section 1, Clause 2:

* * * nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code.

§1.05 Definition of "imprisoned."

As used in the Revised Code, unless the context otherwise requires, "imprisoned" means imprisoned in the county jail if the maximum term prescribed for the offense is one year or less, and imprisoned in the penitentiary if the maximum term prescribed for the offense is longer than one year.

§1.06 Definition of felonies, misdemeanors, and minor offenses.

Offenses which may be punished by death or by imprisonment in the penitentiary are felonies; all other offenses are misdemeanors. As used in the Revised Code "minor offenses" is synonymous with misdemeanor.

§733.78 Officer shall have no interest in municipal contracts.

No member of the legislative authority or of any board and no officer or commissioner of the municipal corporation shall have any interest, other than

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his fixed compensation, in the expenditure of money on the part of such municipal corporation. Any person who violates this section shall be disqualified from holding any office of trust or profit in the municipal corporation, and shall be liable to the municipal corporation for all sums of money or other things received by him, in violation of this section, and if in office he shall be dismissed therefrom.

This section does not apply where a member of the legislative authority or of a board or an officer or commissioner of the municipal corporation, being a shareholder of a private corporation but not being an officer or director thereof, owns not more than five per cent of the stock of such private corporation and the value of such stock does not exceed five hundred dollars. A stockholder who desires to avail himself of the exception provided in this section shall, before entering upon such contract, first file an affidavit with the clerk of the municipal corporation stating his exact status and connection with such private corporation.

§ 2919.08 Officer or agent interested in contracts.

No person, holding an office of trust or profit by election or appointment, or as agent, servant, or employee of such officer or of a board of such officers, shall be interested in a contract for the purchase of property, supplies, or fire insurance for the use of the county, township, municipal corporation, board of education, or a public institution with which he is connected.

Whoever violates this section shall be imprisoned not less than one nor more than ten years.

§ 2919.10 Officer of municipal corporation or township interested in contract.

No officer of a municipal corporation or member of the council thereof or a member of a board of

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township trustees, shall be interested in the profits of a contract, job, work or services for such municipal corporation or township, or act as commissioner, architect, superintendent, or engineer, in work undertaken or prosecuted by such municipal corporation or township during the term for which he was elected or appointed, or for one year thereafter or become the employee of the contractor of such contract, job, work, or services while in office.

Whoever violates this section shall forfeit his office and be fined not less than fifty nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both.

§2919.13 Extortion by a public officer.

No officer under the constitution or laws of this state shall knowingly ask, demand, or receive a reward, other than that allowed by law, to execute his official duty, or knowingly charge, ask, demand, or receive greater fees or costs than are allowed by law for such official duty, or engage in or permit another in his employ to engage in a business, which, by reason of his office such officer is prohibited from doing.

Whoever violates this section shall forfeit his office and be fined not more than two hundred dollars or imprisoned not more than twenty days or both.

A person convicted under this section shall be incapable of holding an office of honor, profit, or trust for seven years thereafter.

§2951.09 Procedure against defendant; rights of citizenship restored; journal entry.

When a defendant on probation is brought before the judge or magistrate under section 2951.08 of the Revised Code, such judge or magistrate shall immediately inquire into the conduct of the defendant, and may terminate the probation and impose any

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sentence which might originally have been imposed or continue the probation and remand the defendant to the custody of the probation authority, at any time during the probationary period. When the ends of justice will be served and the good conduct of the person so held warrants it, the judge or magistrate may terminate the period of probation. At the end or termination of the period of probation, the jurisdiction of the judge or magistrate to impose sentence ceases, and the defendant shall thereupon be discharged. If the defendant has been convicted of or has pleaded guilty to a felony, the judge of the court of common pleas may restore the defendant to his rights of citizenship, of which such convict may or shall have been deprived by reason of his conviction under section 2961.01 of the Revised Code, and if the court makes such order of restoration to citizenship, an entry of the same shall be made on the journal of the court in the action in which the conviction or plea of guilty was entered.

A probation officer shall receive necessary expenses in the performance of his duties.

§ 2961.01 Disfranchisement of convict.

A person convicted of a felony in this state, unless his conviction is reversed or annulled, is incompetent to be an elector or juror, or to hold an office of honor, trust, or profit. The pardon of a convict restores the rights and privileges so forfeited, but a pardon shall not release a convict from the costs of his conviction, unless so specified.

§ 2965.17 Terms for parole; final release; certificate of restoration.

Subject to the limitations imposed by law, the pardon and parole commission may determine the time when, the period for which, and the conditions in accordance with which any prisoner confined in a state

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penal or reformatory institution may be allowed to go upon parole outside the building, enclosure, and premises of the institution to which he has been committed, assigned, or transferred. When a paroled prisoner has performed all the conditions of his parole the commission shall finally release him.

A prisoner who has served the maximum term of his sentence or who has been granted his final release by the commission, shall be restored to the rights and privileges forfeited by his conviction. He shall receive from the commission a certificate of such restoration.

§ 3599.02 Sale of vote by voter.

No person shall before, during, or after any primary, convention, or election solicit, request, demand, receive, or contract for any money, gift, loan, property, influence, position, employment, or other thing of value for himself or another:

(A) For registering or refraining from registering;

(B) For agreeing to register or to refrain from registering;

(C) For agreeing to vote or refraining from voting;

(D) For voting or refraining from voting at any primary, convention, or election for a particular person, question, or issue;

(E) For registering or voting, or refraining from registering or voting, or voting or refraining from voting for a particular person, question, or issue.

Whoever violates this section is guilty of bribery, and shall be fined not less than one hundred nor more than five hundred dollars or imprisoned not more than one year, or both, and shall be excluded from the right of suffrage and holding any public office for five years next succeeding such conviction.

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APPENDIX C.

AFFIDAVIT OF PETITIONER.

STATE OF FLORIDA,
DADE COUNTY.

WINFRED WISNIESKI, petitioner herein, being first duly sworn, deposes and says:

(A) That he is 61 years of age, has been engaged in the business of running a Ford Dealership for 42 years, the dealership being an incorporated entity known as Independence Ford situated in Independence, Ohio;

(B) That he has been a life long resident of Independence, Ohio and is presently visiting in North Miami Beach, Florida on business;

(C) That he held the office of Mayor of Independence, Ohio for 5 consecutive 2 year terms, from January 1, 1956 to December 31, 1965, having been elected by the voters of Independence, Ohio to each such term of office, and that he was a candidate for the office of Mayor of Independence in 1967 and in 1969;

(D) That he has never run for public office nor held public office other than in Independence, Ohio;

(E) That Independence Ford has been in existence since the year 1914 as a Family business, and that since 1914 Independence Ford has furnished parts and service for vehicles of the municipality of Independence, Ohio, and that from 1914 to the present date, there has been no other Ford Dealership within the community;

(F) That Independence Ford continued to furnish parts and to service vehicles of the municipality of Independence, Ohio during the term in office of the petitioner at the urging of the Service Director and Chief of Police because of the convenience of its location in comparison

with other Ford dealers, and because of the reasonableness of the charges for work done;

(G) No vehicles were ever sold by petitioner to the municipality of Independence, Ohio during his term in office;

(H) That he was indicted for having an interest in a contract for the purchase of automobile parts for vehicles owned by the city of Independence while Mayor thereof under Ohio Revised Code 2919.08 in April of 1967 and pled guilty to a violation of Ohio Revised Code 2919.10, a misdemeanor on March 18, 1968; that he was placed on probation for a period of two years on June 11, 1968, and that his probation was terminated on June 2, 1969;

(I) That he has had no other police record;

(J) That he is desirous of running for further public office in Independence, Ohio.

/s/ WINFRED WISNIESKI.

Sworn To and Subscribed in my presence on this 19 day of January, 1970.

ELEANOR B. BALTUCH.
Notary Public, State of Florida at Large
My Commission Expires June 26, 1970
Bonded by American Fire & Casualty Co.